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No. 1043

In the Supreme Court of the United States

October Term, 19[illegible]

CECIL H. BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Vol. 15, 1–26; Pet. App. 41–65) is not yet reported.[1] The opinion

[1] The record consists of 15 volumes. Volumes 7 through 14 contain the reporter's transcript of the trial and are referred to as "Tr." Volumes 1 through 6, which are consecutively paginated, contain various documents and papers filed in the district court and are referred to by appropriate volume number. Volume 15, which is separately paginated, contains the proceedings in the court of appeals and is referred to by volume number. References to the government exhibits introduced into evidence at the trial, which are lodged with the Clerk of this Court, are "G. Ex."

of the district court denying motions for a new trial (Vol. 6, 963–977; Pet. App. 67–82) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1964 (Vol. 15, 1; Pet. App. 41, 66). The petition for a writ of certiorari was filed on April 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence showed separate conspiracies.

2. Whether it was proper to instruct the jury that if it determined that there had been separate conspiracies it should consider conspirators' acts and declarations only against defendants who were members of the same particular conspiracy.

3. Whether the failure to produce an F.B.I. agent's handwritten interview notes, which were destroyed in good faith after the reports prepared from the notes had been approved by the witness, violated 18 U.S.C. 3500.

4. Whether the trial court properly refused to permit the defense to call as a witness one of the prosecutors trying the case.

5. Whether the trial court properly refused to allow petitioner's counsel to comment in closing argument about the failure of two co-defendants to take the witness stand.

STATUTE INVOLVED

Section 501 of the Landrum-Griffith Act of 1959, 73 Stat. 535, 29 U.S.C. 501(c), provides:

> Any person who embezzles, steals, or unlawfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

A 16-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and six co-defendants, as officers and employees of three labor organizations affiliated with the International Brotherhood of Teamsters, with conspiring, from September 1959 to February 1962, to embezzle substantial amounts of money and assets of the organizations, and with embezzlement pursuant to the conspiracy, in violation of 18 U.S.C. 371 and 29 U.S.C. 501(c) (Vol. 1, 1–22). Co-defendant Robert Williams pleaded guilty to the counts in which he was charged and testified for the government (Tr. 59, 274). After a jury trial, petitioner was found guilty of conspiracy and one substantive violation (Tr. 2072–2073; Vol. 5, 758).[2] Petitioner was sentenced to

[2] Co-defendants Floyd Hayes and Stanley Clevenger were convicted of conspiracy and two or more substantive counts (Tr. 2070, 2071; Vol. 4, 756–757, 760; Vol. 6, 978, 981). Co-defendants Roy Williams, Earl Dean Williams and Karl Rogers were acquitted on all counts in which they were charged (Tr. 2069, 2071, 2073; Vol. 4, 754–755, 759, 761).

imprisonment for two years on the conspiracy count to be followed by probation for two years on the substantive count (Vol. 6, 980). The court of appeals affirmed the convictions (Pet. App. 41–65).[3]

The pertinent facts may be summarized as follows:

1. Locals 41 and 541 and Joint Council 56 were labor organizations affiliated with the International Brotherhood of Teamsters and maintained offices in the same building in Kansas City, Missouri (Tr. 59–62, 64, 317–318; Vol. 4, 642). The indicted defendants were all officers or employees of those unions. Hayes was the Secretary-Treasurer of Local 41 and Joint Council 56 until he was imprisoned on an income-tax-evasion conviction in August 1959 (Tr. 62–63, 65, 67; see Tr. 199–200, 204, 982, 987). During Hayes' imprisonment, petitioner was the acting Secretary-Treasurer of Local 41, and he continued to hold the office after Hayes' release in the latter part of 1960 (Tr. 62–63, 65, 67, 69, 243). As Secretary-Treasurer, petitioner co-signed all checks releasing funds of the Local (Tr. 1266–1267).

a. In 1954, the three labor organizations opened charge accounts at the La Louisiane Restaurant in Kansas City, Missouri, for the use of their officers and agents (Tr. 71–73, 74, 255–257, 343–346). Thereafter, Hayes proposed to the restaurant's proprietor that the monthly invoices of each organization be "padded" by $240, of which the proprietor would retain $40 while making a "kickback" of $200 to Hayes (Tr. 348–349). This practice was then instituted (Tr.

[3] Co-defendants Hayes and Clevenger have not petitioned for certiorari.

352–355, 365–366, 394–395, 407–408, 415–416. In July 1957, Hayes instructed the restaurant owner to "increase the pad" on each of the three accounts to $300 per month, with $250 going to Hayes and $50 to the proprietor on each account. This, too, was done (Tr. 353–354, 360–361, 368–382, 396–405, 410–415).

Hayes made similar arrangements for increased bills at a particular D–X gasoline station (later called Harold's D–X Service Station) in Kansas City (Tr. 504–513, 538–540). The monthly "pads" on the three accounts totaled $650 plus 10% of the actual union expenses (Tr. 92–93, 101, 538–540, 550–551). In addition, the personal automobile expenses incurred by Roy Williams (President of Local 41 and Joint Council 56) and his wife were added to the union's account, and 50% of the profit made on the sale of new tires to the union at retail, instead of fleet, prices was "kicked back" to Hayes (Tr. 92–94, 310–311, 540–541, 551).* Hayes was collecting each of these monthly kickbacks until his imprisonment (Tr. 103, 354–355, 368–382, 396–405, 410–415, 482, 511–513, 523–524, 541, 542; see Tr. 562–566, 582, 588).

In August 1959, Hayes instructed Robert Williams to collect the payoffs from La Louisiane and Harold's D–X, to keep $150 a month as his compensation for these "extra duties", and to divide the balance among Hayes' wife, Rogers (President of Local 541) and

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*At first, Roy Williams' personal account was simply added to the total amount of the invoices, which the labor organizations paid (Tr. 94). Later, Roy paid his personal account, but that amount was added to the monthly statements to the labor organizations and Roy was "reimbursed" via kickbacks for such amounts (Tr. 93–94, 277).

Roy Williams (Tr. 75–80, 82–84, 90–92, 222–223, 248). Robert Williams did so until the arrangements were terminated in 1960 and 1961 (Tr. 89, 91–109, 207–209, 212–219, 277, 356, 362, 542, 550, 582, 588, 597).

After Hayes' imprisonment (in August 1959), petitioner, who was acting Secretary-Treasurer, co-signed the Local 41 checks which, together with checks from Local 541 and Joint Council 56, were used to pay the padded invoices (Tr. 368, 372–383, 397–405, 410–415; G. Exs. "A", "B" and "C" Series). In early fall of 1961, after the F.B.I. had begun an investigation of the case—a matter which was common knowledge at the union building (Tr. 230, 247)—the proprietor of Harold's D–X gave petitioner the final kickback on the accounts of Local 41 and Joint Council 56, with instructions to give the envelope to Robert Williams (Tr. 138–139, 546, 580, 582, 583, 588–590). Petitioner tried to deliver the envelope in a men's room at the union building, but Robert refused it and told petitioner to return the envelope "because the government agents very probably have taken pictures of you accepting it" (Tr. 138–140, 229–231, 546, 588–590).

b. During the relevant periods, Local 41 and Joint Council 56 paid repair expenses on personal automobiles of union officials used for union business (Tr. 143–145, 1570), and provided allowances for depreciation and insurance premiums on such automobiles (Tr. 678, 726, 727, 763–764, 769–771, 1569–1570). No depreciation or repair allowances were authorized

for rented automobiles or personal cars not used on union business (Tr. 155, 1569–1570; see Tr. 719).

In 1957 or 1958, Hayes made arrangement with the personnel at the Hoffman-Buick and Greenlease-O'Neill Oldsmobile firms of Kansas City whereby repair orders on unauthorized automobiles would be charged on the unions' invoices as if the repairs had been done on authorized automobiles (Tr. 610–613, 812–814; see Tr. 71–72, 74, 143–144, 145–147, 615–630, 696–698). Petitioner ordered such repairs on unauthorized vehicles at Hoffman-Buick more than ten times prior to 1959 (Tr. 612, 614–616), and had the repairs charged to authorized vehicles.

From October 9, 1959, petitioner was furnished with a leased automobile by Local 41 (Tr. 240, 673, 675, 728, 759–761; see Tr. 155, 1570), and the union ceased paying petitioner a $90 per month depreciation allowance on his personal 1957 Lincoln automobile (Tr. 1569–1570). Between December 1959 and September 1960, petitioner had his personal Lincoln serviced and repaired on seven occasions at Hoffman-Buick, and instructed Hoffman personnel to charge the repairs to the 1957 Oldsmobile of one Kappelman, the Vice-President of Local 41 (Tr. 612, 615–630, 696–698, G. Exs. G. 1–2, 6–7, 16–17, 21–22, 24–25, 29–30, 32–33). On at least one occasion, petitioner affixed the signature of "L. Kappelman" to the repair order (Tr. 1578). The invoices reflecting the repairs of petitioner and others were sent to and paid by Local 41 and Joint Council 56, the checks of Local 41 being signed by petitioner and Roy Williams (Tr. 734–736,

811–812, 861–866; G. Exs. "G", "H", "I", and "J" Series.)

e. In 1959, a builder who constructed a porch on Hayes' home, was paid with a Local 41 check for $2,375 signed by Hayes and Roy Williams (Tr. 945–948; G. Ex. N–1). While Hayes was in the penitentiary, about $2,000 worth of improvements, ordered by Mrs. Hayes, were performed (Tr. 949–950, 959–960, 1010–1011, 1013–1015, 1016–1017, 1018–1020, 1023–1024, 1025–1026). The builder thereafter was paid for these improvements by a check from Local 41 signed by petitioner and Roy Williams, which covered the improvements as well as payment for some work performed at the union building (Tr. 956, 959–960, 988, 998, 1002–1003; G. Ex. N–2). About $6,000 worth of additional improvements on the Hayes home were included in a bill send to Local 41 in April 1961, which also covered a major improvement job at the union building (Tr. 962–973). The bill was paid by Local 41 checks signed by petitioner and Roy Williams (Tr. 1006; G. Ex. O 1–3, 5, 7 and 8).

In February 1961, furniture bought by Hayes for his home was billed to Local 41 along with the union's purchases and paid for by check signed by petitioner and Roy Williams in the total amount of $1,049.20; $464.46 was in payment of the Hayes' furniture (Tr. 892–899, 906–908, 910; G. Ex. M 1–6; see Tr. 918–919, 923, 925–926; Vol. 1, 45).

2. In its instructions to the jury, the court charged that to convict a defendant of conspiracy the jury must believe beyond a reasonable doubt that a conspiracy existed, that the defendant knew of the

conspiracy, and that "there also existed on the part of each defendant a voluntary and intentional association by him in the understanding and object of the conspiracy" (Tr. 2028–2034). The court said that the "participation of any single individual [could] be determined only by the evidence as it relates to him"; that once the jury found a conspiracy to exist and that a particular defendant was a member of it, the acts and declarations of co-conspirators in furtherance of the conspiracy could be considered against him; and that "the acts and declarations of each conspirator considered individually may be evidence of his own connection with the conspiracy, and the conspiracy may be proved by the sum and total of the acts and declarations of all participants" (Tr. 2028–2036). The court then charged (Tr. 2036):

> * * * If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count 1 and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy.

ARGUMENT

All of petitioner's contentions were fully considered and correctly rejected by the district court (which stated its reasons in an opinion) and by the court of appeals. There is no real conflict among

circuits on any of the questions presented by this case, and no issue calling for this Court's consideration is involved.

1. Petitioner's claim (Pet. 18–24) that the evidence established the existence of three separate conspiracies rather than a single overall venture, and that he was prejudiced by this variance under the rule of *Kotteakos* v. *United States*, 328 U.S. 750, is without merit. First, the evidence showed that the conspirators named as defendants in the indictment were, in fact, engaged in "a larger general scheme" or "single, over-all, comprehensive plan" (*Blumenthal* v. *United States*, 332 U.S. 539, 558) to divert union funds for the benefit of Hayes and his friends. This case does not involve, as did *Kotteakos*, the "fringe" participants in a conspiracy who were linked to other conspirators only through a common "hub." Consequently, the conspiracy may be defined in terms of the single purpose of its principal members. This conclusion is not affected by the fact that the conspirators may have operated at different levels of authority, or by the fact that not all conspirators had equal stakes in the venture. Nor need all the participants in a single conspiracy know of all the conspiratorial activities of their cohorts. *United States* v. *Kissel*, 218 U.S. 601, 607; *Isaacs* v. *United States*, 301 F. 2d 706, 727–728 (C.A. 8), certiorari denied, 371 U.S. 818; *United States* v. *Crosby*, 294 F. 2d 928, 945 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. Moreover, since petitioner was implicated in each of the three allegedly separate conspiracies by reason of his having signed the Local 41 checks which were used

to make the various payments, he could not have been prejudiced even had the evidence disclosed multiple conspiracies. See *Monroe* v. *United States*, 234 F. 2d 49 (C.A.D.C.), certiorari denied, 352 U.S. 873; *Ritter* v. *United States*, 230 F. 2d 324, 329 (C.A. 10); *Canella* v. *United States*, 157 F. 2d 470 (C.A. 9). And the jury's verdict, under which petitioner was found guilty only of the substantive offense involving some benefit to himself—*i.e.*, the use of union funds to pay for personal auto service and repairs—cannot be taken as affirmative proof that the jury found petitioner blameless with regard to the other ventures.

2. Petitioner's contention (Pet. 24–26) that the trial court's instruction regarding separate conspiracies (*supra*, p. 9) permitted the jury to convict for offenses not charged in the indictment is also insubstantial. The evidence disclosed that some co-conspirators might be involved only in limited portion of the overall scheme. The judge therefore properly protected the rights of all parties and prevented any impermissible carryover of evidence. The discrimination exercised by the jury, which acquitted two defendants,[5] indicates that it followed the court's instructions.[6]

3. At the trial, the government turned over to the defense a total of 20 reports covering information

[5] Co-defendant Karl Dean Williams was granted a directed verdict of acquittal.

[6] There is no foundation to petitioner's claim (Pet. 24–25) that the decision below conflicts with *Brooks* v. *United States*, 164 F. 2d 142 (C.A. 5), where the court, finding that the proof showed separate and distinct conspiracies, reversed the case because of an instruction that the acts and declarations of each would be admissible against the others. The trial court's instructions here avoided the error found in *Brooks*.

which Robert Williams had given to various agents of the F.B.I. on the subjects testified to at the trial (Tr. 53–56). F.B.I. Agent Myers testified that he interviewed Robert Williams on five occasions; that he and another agent asked questions and took longhand notes of the answers; that his notes were fragmentary; that some of the notes covered "other matters"; and that, shortly after the interviews, he dictated his reports from the notes as supplemented by his memory (Tr. 174–176, 188–189). The handwritten notes were not shown to Williams, but after the "smooth reports" were prepared they were submitted to Williams who made a few changes and then approved them (Tr. 181). After the reports had been prepared, Agent Myers destroyed his handwritten notes in accordance with his custom during his 21-year tenure with the F.B.I. (Tr. 178).

As shown by the record, the interview notes were not producible "statements" within the ambit of 18 U.S.C. 3500(e). They were not shown to Williams, nor did he sign, adopt or otherwise approve of them. The notes were not a substantially verbatim recital of what Williams had told Agent Meyers. They were fragmentary jottings which Meyers used, along with his memory, to prepare the "smooth" reports. The final reports were approved by Williams, and these were furnished to the defense at the trial. After the notes had served their purpose, they were destroyed in good faith by Agent Meyers in accordance with his custom and practice. Under these circumstances, petitioner was clearly not entitled to production of the

notes, much less to the striking of Williams' testimony. *Killian* v. *United States*, 368 U.S. 231, 242.[7]

4. Robert Williams testified on cross-examination that he had a conference with Mr. James Featherstone, one of the government attorneys, in which Williams stated his intention to cooperate with the government (Tr. 270–271). Williams testified that Featherstone had told him that the government "couldn't make any promises" for his cooperation and that it could only "make recommendations" to the court (Tr. 219–220, 273–274). The following then transpired (Tr. 274):

> Q. [By Mr. Wadden, counsel for one of the acquitted defendants]. Recommendations. He would recommend to the judge you get leniency? Right?
>
> A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendation.
>
> Q. What did you take this to mean?
>
> A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

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[7] *Papworth* v. *United States*, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854, upon which petitioner relies, is inapposite. There, as disclosed in the opinion of the district court (156 F. Supp. 842, 853), the agent testified that his notes contained the substance of the information given by the witness. In addition, the notebook of the agent was delivered to the trial court in *Papworth* for *in camera* inspection along with the final report. The court observed that the notes had been typewritten exactly as they appeared in the notebook. Under these circumstances, the trial court decided that both the notes and the typed report were subject to production under 18 U.S.C. 3500(e)(2).

Later in the trial, counsel sought to call Featherstone as a witness. At a bench conference, counsel said that his purpose was to establish the conversation, "to know whether there was any inducement, whether there was any encouragement, whether there were any promises made to him * * *" (Tr. 1487, 1489). He said that he wanted to know "what [Featherstone's] recommendation were going to be" (Tr. 1492). The following colloquy transpired (Tr. 1493–1495):

> Mr. FEATHERSTONE. And further, Your Honor, if any questions were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.
>
> The COURT. Well, I think they would have invited that if they put you on the stand.
>
> Mr. BROADDUS [counsel for co-defendant Clevenger]. Not this counsel, Your Honor.
>
> * * * * * *
>
> Mr. FEATHERSTONE. As to the recommendations, that question has been answered. As to the other part of the conversation, it would have to be concerning his personal safety, the tie-up between the local Mafia and the Teamsters, and various other matters. That is the only other things we discussed, his personal safety and how we would prevent the Teamsters from killing him. Now, if he wants that——

The court then said that before ruling it wished to have a sworn statement from Featherstone indicating "what the evidence [would] be and whether or not it would be essential to the presentation of [the]

defense" (Tr. 1495). On the following day—before an affidavit was filed—counsel renewed his application to call Featherstone as a witness. Without any reference by the court or either party to the absence of the affidavit, the motion was overruled (Tr. 1715).

This ruling was a proper exercise of discretion by the trial court. See *Fisher* v. *United States*, 231 F. 2d 99, 104 (C.A. 9); *Gajewski* v. *United States*, 321 F. 2d 261, 268 (C.A. 8); *United States* v. *Alu*, 246 F. 2d 29, 33 (C.A. 2). Not only was there a substantial likelihood that other defendants would have been prejudiced if Featherstone had been called as a witness and asked for the full conversation he had had with Williams (*i.e.*, including statements concerning Williams' personal safety and steps the government would take to "prevent the Teamsters from killing him")—a risk which co-defendant Clevenger expressly refused to assume—but, as the court of appeals correctly noted (Pet. App. 60), Williams' testimony conveyed "the thought that he was expecting some special consideration and there [was] little reason to believe in the light of Mr. Featherstone's record statement that anything Mr. Featherstone could say would be of any help to the defendant."[*]

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[*] Petitioner's claim (Pet. 35–36) that the decision below conflicts with the *Alu* and *Gajewski* cases, *supra*, is without foundation. In *Gajewski*, the court pointed out that the district court "*may, without abusing its discretion*, refuse to allow the defense to call as a witness the United States Attorney trying the case." *Id.* at 268. (Emphasis added.) In *Alu*, the Assistant United States Attorney who conducted a particular grand jury proceeding was called as a witness by the

5. Finally, there is no merit to petitioner's contention (Pet. 26–29) that the trial court erred in refusing to allow his counsel during closing argument to comment upon the failure of co-defendants to testify. While petitioner undoubtedly had the right to emphasize to the jury that *he* had taken the witness stand and testified, it would prejudice his co-defendants if he commented on their failure to take the stand. See *Stewart* v. *United States*, 366 U.S. 1, 5–10; *Wilson* v. *United States*, 149 U.S. 60, 65.

De Luna v. *United States*, 308 F. 2d 140 (C.A. 5), rehearing denied, 324 F. 2d 375, is clearly distinguishable. In that case, it was held that a defendant has the right to comment on the failure of a co-defendant to take the stand when the first defendant's defense is that the co-defendant alone is the culpable party. Here, petitioner did not assert that the non-testifying defendants (Hayes and Clevenger) where the really blameworthy parties. He testified only that he committed no wrongful act (*e.g.*, Tr. 1547, 1550–1554). As the court of appeals said (Pet. App. 65), "Under such circumstances, it is difficult to perceive any benefit that might flow to Bennett by permitting him to call the attention of the jury to the fact that some

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prosecutor and testified as to matters before the grand jury. While the court held that the trial court did not err in allowing this testimony, it nevertheless criticized the "dubious propriety" on the part of the government in calling the witness and relying on his testimony. The court noted that "lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice." *Id.* at 33, 34.

of his co-defendants did not testify." Consequently, the district court was fully justified in preserving the rights of the co-defendants.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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